IN THE

Supreme Court of the United States

October Term, 1942.

No.....

STATE OF OHIO, on the relation of S. H. SQUIRE, Superintendent of Banks in Charge of the Liquidation of The Union Trust Company of Cleveland, Ohio,

Petitioner,

vs.

CLARENCE H. PORTER,

Respondent.

BRIEF OF OHIO SUPERINTENDENT OF BANKS IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

May It Please the Court:

I.

The Opinions of the Courts Below.

Full references to the opinions of the California courts in this cause (Rule 27, par. 2(b)) are given in the Petition under "A. The Opinions of the Courts Below"; and the petitioner requests leave, in the interest of brevity, to incorporate that portion of the Petition by reference here.

II.

Jurisdictional Statement.

The grounds upon which the jurisdiction of this Honorable Court is invoked (Rule 27, par. 2(c)) are stated in the Petition under "C. Jurisdictional Statement"; and the petitioner requests leave, in the interest of brevity, to incorporate that portion of the Petition by reference here.

III.

Statement of the Case.

A statement of the case (Rule 27, par. 2(d)) is set forth in the Petition under "B. Summary Statement of the Matter Involved"; and the petitioner requests leave, in the interest of brevity, to incorporate that portion of the Petition by reference here.

IV.

Specification of Errors.

The errors urged (Rule 27, par. 2(e)) are specified in the Petition under "E. Reasons for Granting Writ and Specification of Errors"; and the petitioner requests leave, in the interest of brevity, to incorporate that portion of the Petition by reference here.

V.

Summary of the Argument.

A. The statutes of Ohio, as manifested by assessments of the Ohio Superintendent of Banks, are "public acts" entitled to full faith and credit by virtue of Article IV, Section 1, of the Federal Constitution.

B. The Ohio assessment, being a substantive right conferred by statute, is entitled to the same faith and credit in California as in Ohio.

C. The courts of Ohio consistently recognize and enforce the obligations of bank stockholders arising from the Ohio Superintendent's assessments.

D. California's refusal in the case at bar to recognize the Ohio Superintendent's statutory cause of action, or to enforce the correlative liability of the stockholder, constitutes a denial of full faith and credit to the "public acts" of Ohio.

E. It is unconstitutional for California to go behind the statutory assessment and resort to a lapse of time prior to the existence of the Ohio Superintendent's cause of action in order to apply Section 359 of the California Code of Civil Procedure.

F. California's discrimination as between assessments levied under parallel facts in Ohio and California abridges the privileges and immunities guaranteed by Article IV, Section 2, of the Federal Constitution.

VI.

Argument.

A. THE STATUTES OF OHIO, AS MANIFESTED BY ASSESSMENTS OF THE SUPERINTENDENT OF BANKS, ARE "PUBLIC ACTS" ENTITLED TO FULL FAITH AND CREDIT BY VIRTUE OF ARTICLE IV, SECTION 1, OF THE FEDERAL CONSTITUTION.

The Ohio statutes imposing bank stockholders' liability, and providing for its enforcement by the Superintendent of Banks, are Sections 710-75 and 710-95 of the General Code of the State of Ohio (108 Ohio Laws (1919) 97, 103; Appendix B).

Section 710-75 provides:

> "Stockholders of banks shall be held individually responsible, equally and ratably, and not one for another, for all contracts, debts and engagements of such bank, to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares. . . . *At any time after taking possession of a bank for the purpose of liquidation when the superintendent of banks ascertains that the assets of such bank will be insufficient to pay its debts and liabilities he may enforce the individual liability of the stockholders.*" (Italics added.)

The right to impose such liability is established by Article XIII, Section 3, of the Ohio Constitution [Appendix B].

These Ohio statutes find their source in the National Bank Act. In *State v. Murfey, Blossom & Co.*, 131 Ohio

St. 289, 305, 2 N. E. (2d) 866, 873 (1936), the Ohio Supreme Court said:

> "The state banking law of Ohio was practically copied from the National Bank Act of the United States (12 U. S. C. A., sec. 21 *et seq.*), and naturally the germane decisions of the Federal Courts are most persuasive."

Indeed, the Ohio statutes follow the National Bank Act almost word for word.[9] Interestingly enough, the descriptive term "assessment" crept into usage through the courts. Nowhere in the sections of the National Bank Act relating to the double liability of stockholders is the word to be found.[10] Since 1880 this Court has employed "assessment" to connote the determination of the stockholder's obligation under the National Bank Act.[11] In Ohio the term "assessment" likewise crept into usage through the courts.[12]

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[9] *Baumgardner v. State*, 48 Ohio App. 5, 16-25, 192 N. E. 349, 355-361 (motion to certify denied by Ohio Sup. Ct., 1934).

[10] R.S. §§ 5151, 5220, 5234 (1875); 19 Stat. 63; 12 U.S.C. §§ 63, 64, 181, 191, 192 (1934).

[11] *Kennedy v. Gibson*, 8 Wall. 498, 19 L. ed. 476 (1869);
Casey v. Galli, 94 U. S. 673, 24 L. ed. 168 (1877);
United States v. Knox, 102 U. S. 422, 433, 26 L. ed. 216 (1880).

[12] *Lang v. Osborn Bank*, 100 Ohio St. 51, 125 N. E. 105 (1919);
Squire v. Standen, 135 Ohio St. 1, 4, 18 N. E. (2d) 608, 609 (1939);
Baumgardner v. State, 48 Ohio App. 5, 7, 14, 192 N. E. 349, 351, 354 (1934).

Thus the cause of action in the case at bar rests upon a statutory base, and the Ohio Superintendent of Banks is empowered to enforce it both within and without Ohio. (§§710-75, 710-95 of the Ohio General Code; Appendix B.)[18]

As this Court said in *Broderick v. Rosner*, 294 U. S. 629, 643, 644, 55 S. Ct. 589, 79 L. ed. 1100, 1107, 1108 (1935):

> "Here the nature of the cause of action brings it within the scope of the full faith and credit clause. The statutory liability sought to be enforced is contractual in character. The assessment is an incident of the incorporation. Thus the subject matter is peculiarly within the regulatory power of . . . the State of incorporation. . . . In respect to the determination of liability for an assessment, the . . . stockholders submitted themselves to the jurisdiction. . . .
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> "The fact that the assessment here in question was made under statutory direction by an administrative officer does not preclude the application of the full faith and credit clause . . . because statutes are 'public acts' within the meaning of the clause."

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[18]Compare:

Christopher v. Brusselback, 302 U. S. 500, 58 S. Ct. 350, 82 L. ed. 388 (1938);

Wheeler v. Greene, 280 U. S. 49, 50 S. Ct. 21, 74 L. ed. 160 (1929).

B. THE OHIO ASSESSMENT, BEING A SUBSTANTIVE RIGHT CONFERRED BY STATUTE, IS ENTITLED TO THE SAME FAITH AND CREDIT IN CALIFORNIA AS IN OHIO.

In the language of *John Hancock Mutual Life Ins. Co. v. Yates*, 299 U. S. 178, 183, 57 S. Ct. 129, 81 L. ed. 106, 109 (1936):

> "Because the statute is a 'public act,' faith and credit must be given to its provisions as fully as if . . . declared by a judgment. . . ."

As Mr. Chief Justice Stone said in *Milwaukee County v. M. E. White Co.*, 296 U. S. 268, 276-277, 56 S. Ct. 229, 80 L. ed. 220, 228 (1935):

> "The very purpose of the full faith and credit clause was to alter the status of the several states as independent foreign sovereignties, each free to ignore *obligations created under the laws* or by the judicial proceedings of the others, and to make them integral parts of a single nation throughout which a remedy upon a just obligation might be demanded as of right, irrespective of the state of its origin." (Italics added.)

C. THE COURTS OF OHIO CONSISTENTLY RECOGNIZE AND ENFORCE THE OBLIGATIONS OF BANK STOCKHOLDERS ARISING FROM THE OHIO SUPERINTENDENT'S ASSESSMENTS.

Cases in which the Ohio courts have recognized and enforced the obligations of assessments similarly levied by the Ohio Superintendent of Banks are:

Squire v. Standen, 135 Ohio St. 1, 18 N. E. (2d) 608 (1939);

Squire v. Solinski, 132 Ohio St. 180, *sub nom Squire v. Borton & Borton*, 5 N. E. (2d) 479 (1936);

State v. Murfey, Blossom & Co., 131 Ohio St. 289, 2 N. E. (2d) 866 (1936);

Lien v. Fechheimer, ... Ohio App. ....., 44 N. E. (2d) 265 (1942);

State v. Cruikshank, 51 Ohio App. 61, 199 N. E. 611 (1935);

Baumgardner v. State, 48 Ohio App. 5, 21, 192 N. E. 349, 357 (1934);

State v. Melaragno, 31 Ohio Law Rep. 627 (1930).

In fact, the Ohio courts have on more than one occasion recognized and enforced, at the suit of the Ohio Superintendent, the identical assessment sued upon in the case at bar:

Squire v. Standen, 135 Ohio St. 1, 18 N. E. (2d) 608 (1939);

S. H. Squire, Supt. of Banks, v. Abbott, 8 Ohio Ops. 134 (1937).

The constitutional command of the full faith and credit clause must be observed, and this Court will examine the laws of Ohio in order to assure that observance.

Adam v. Saenger, 303 U. S. 59, 64, 58 S. Ct. 454, 457, 82 L. ed. 649, 652, 653 (1938);

Titus v. Wallick, 306 U. S. 282, 288, 59 S. Ct. 557, 561, 83 L. ed. 653, 657 (1939).

D. CALIFORNIA'S REFUSAL IN THE CASE AT BAR TO RECOGNIZE THE OHIO SUPERINTENDENT'S STATUTORY CAUSE OF ACTION, OR TO ENFORCE THE CORRELATIVE LIABILITY OF THE STOCKHOLDER, CONSTITUTES A DENIAL OF FULL FAITH AND CREDIT TO THE "PUBLIC ACTS" OF OHIO.

The Ohio Constitution of 1851 provided for double liability of stockholders generally. The statutes enacted pursuant thereto provided for enforcement solely by means of an equitable class suit in the nature of a creditors' bill.

Barrick v. Gifford, 47 Ohio St. 180, 24 N. E. 259 261 (1890);

Bronson v. Schneider et al., 49 Ohio St. 438, 33 N. E. 233, 234 (1892);

Blackburn v. Irvine, 205 Fed. 217, 220, 222 (C. C. A. 3d, 1913);

Irvine v. Bankard, 181 Fed. 206, 211 (C. C. D. Md., 1910), aff'd 184 Fed. 986 (C. C. A. 4th, 1911).

In 1903 the provisions for general stockholders' liability in Ohio were repealed. On September 3, 1912, the con-

stitutional amendment providing for double liability of stockholders of Ohio state bank was adopted [Appendix B]; it went into effect on January 1, 1913.

Allen v. Scott, 104 Ohio St. 436, 135 N. E. 683, 684-685 (1922);

Baumgardner v. State, 48 Ohio App. 5, 192 N. E. 349, 355-357 (motion to certify denied by Ohio Sup. Ct., 1934).

In the first case to arise under the amendment, *Lang v. Osborn Bank*, 100 Ohio St. 51, 54-55, 125 N. E. 105, 106 (1919), the Ohio Supreme Court said:

> "The constitutional amendment of September 3, 1912 . . . needs no aid from legislative enactment. It is clearly self-executing. If however, such aid were required, it was abundantly provided in the general scope of the statutes found in 103 Ohio Laws, 530, as passed April 14, 1913. . . . The right of the superintendent of banks to bring this action for and on behalf of the creditors of the bank, in his capacity as trustee, cannot now be questioned. . . . the stockholders . . . were . . . subject to the liabilities imposed by the . . . constitutional provision and the statutes pertaining thereto."

It was thus settled under Ohio law, as under the National Bank Act, that the statutory liquidator is given the cause of action to enforce the statutory obligation of the stockholders;[14] and the creditors have no cause of action

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[14] *Feldman v. The Standard Trust Bank of Cleveland*, 46 Ohio App. 67, 187 N. E. 743 (motion to certify denied by Ohio Sup. Ct., 1933);

Fulton v. Wetzel, 47 Ohio App. 72, 190 N E. 776; cert. denied, 293 U. S. 531, 55 S. Ct. 207, 79 L. ed. 640 (1934).

except in cases of banks undergoing voluntary liquidation.[15]

Significantly, the California Supreme Court in the case at bar resorts to the unfounded declaration that "February 27, 1933, the day the bank failed to meet its obligations in the ordinary course of business and limited its payments to 5 per cent of any demand deposit or matured obligation marked the beginning of voluntary liquidation." [R. 60.]

There is no possible basis, either in fact or in law, for that statement. The Union Trust Company never undertook voluntary liquidation. The fact is that the stockholders opposed even involuntary liquidation of the bank. (*Squire v. Abbott*, 8 Ohio Ops. 134 (1937).)

As the Ohio Supreme Court stated in *Squire v. Standen*, 135 Ohio St. 1, 4, 18 N. E. (2d) 608, 610 (1939), upon enforcing the identical assessment sued upon in the case at bar:

> "It is . . . shown by the record that on February 27, 1933, the Union Truts Company restricted the withdrawal of funds by its depositors; on June 15, 1933, it was taken over for liquidation by the Superintendent of Banks; and on July 30, 1934 . . .

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[15]Compare:

Brown v. O'Keefe, 300 U. S. 598, 603-604, 57 S. Ct. 543, 81 L. ed. 827, 833 (1937);

Richmond v. Irons, 121 U. S. 27, 7 S. Ct. 788, 30 L. ed. 864 (1887);

Kennedy v. Gibson, 8 Wall. 498, 19 L. ed. 476 (1869);

Stephens Fuel Co. v. Bay Parkway National Bank, 109 F. (2d) 186 (C.C.A. 2nd, 1940);

Hall v. Ballard, 90 F. (2d) 939 (C.C.A. 4th, 1937);

Snider v. United Banking & Trust Co., 124 Ohio St. 375, 178 N. E. 840 (1931);

Baumgardner v. State, 48 Ohio App. 5, 192 N. E. 349, 357 (motion to certify denied by Ohio Sup. Ct., 1934).

the superintendent issued an order *levying an assessment* of one hundred per cent or $25 per share upon all stockholders, *in accordance with* Section 710-75, General Code." (Italics added.)

Thus it seems clear the majority opinion of the California Supreme Court seized upon an utterly false premise in order to avoid the Ohio Superintendent's statutory cause of action in the case at bar. As the opinion of the two disesnting justices points out:

> "The opinion ignores the fact that the suits in question are brought upon a statutory assessment that would be fully recognized and enforced in the Ohio courts . . . and thus gives rise to an unconstitutional denial of full faith and credit to the statutes of Ohio and the assessment levied thereunder." [R. 67.]

E. IT IS UNCONSTITUTIONAL FOR CALIFORNIA TO GO BEHIND THE STATUTORY ASSESSMENT AND RESORT TO A LAPSE OF TIME PRIOR TO THE EXISTENCE OF THE OHIO SUPERINTENDENT'S CAUSE OF ACTION IN ORDER TO APPLY SECTION 359 OF THE CALIFORNIA CODE OF CIVIL PROCEDURE.

The closing paragraph of the majority opinion in the case at bar reads:

> "We therefore conclude that under the law of Ohio the stockholders' liability here sought to be enforced was created on the 27th day of February, 1933, and that as the action was not brought within three years after that date it is barred by section 359 of our Code of Civil Procedure." [R. 63.]

The California Supreme Court thus refused to recognize the assessment of July 30, 1934. For the majority opinion ignores the fact that the Ohio Superintendent's

cause of action rests upon both the "constitutional provision and the statutes pertaining thereto." (*Lang v. Osborn Bank*, 100 Ohio St. 51, 55, 125 N. E. 105, 106 (1919).)

Obviously, the entire body of relevant Ohio law governs the Ohio Superintendent's cause of action and the stockholder's correlative liability. The provisions of the Ohio Constitution are a vital part of that body of Ohio law. "But," as this Court said in *Whitman v. Oxford National Bank*, 176 U. S. 559, 563, 20 S. Ct. 477, 44 L. ed. 587, 590 (1900):

> ". . . this constitutional provision does not stand alone. The legislature . . . has acted on the subject-matter, and the Constitution and the statutes are to be taken together, as making one body of law; and it serves no good purpose to inquire what rights and remedies a creditor of a corporation might have, or what liabilities would rest upon a stockholder, if either Constitution or statutes stood alone and unaided by the other."

In an unbroken line of decisions this Court has held that assessments levied pursuant to statutes of sister states cannot be ignored.[16] As Professor Dodd points

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[16] *Glenn v. Liggett*, 135 U. S. 533, 10 S. Ct. 867, 34 L. ed. 262 (1890);
Converse v. Hamilton, 224 U. S. 243, 32 S. Ct. 415, 56 L. ed. 749 (1912);
Selig v. Hamilton, 234 U. S. 652, 34 S. Ct. 926, 58 L. ed. 1518 (1914);
Marin v. Augedahl, 247 U. S. 142, 38 S. Ct. 452, 62 L. ed. 1038 (1918);
Broderick v. Rosner, 294 U. S. 629, 55 S. Ct. 589, 79 L. ed. 1100 (1935);
Chandler v. Peketz, 297 U. S. 609, 56 S. Ct. 602, 80 L. ed. 881 (1936);
Sovereign Camp v. Bolin, 305 U. S. 66, 79, 59 S. Ct. 35, 83 L. ed. 45, 52 (1938).

out, [17] the statutory base of the assessment requires its enforcement.[18]

Although Section 359 of the California Code of Civil Procedure is called a statute of limitations, in its application here, it is closely akin to the New Jersey statute in *Broderick v. Rosner,* 294 U. S. 629, 55 S. Ct. 589, 79 L. ed. 1100 (1935).

As Justice Traynor states in the dissenting opinion at bar:

> "Section 359, while located in that part of the Code of Civil Procedure dealing with statutes of limitation generally, is no ordinary statute of limitations. The section requires that actions against stockholders to enforce a liability created by law be brought 'within three years after . . . the liability was created.' The three-year period commences to run from the date the liability is created, irrespective of when the cause of action accrues, and the action might be barred thereunder before any right to sue accrues. . . . This statute, far from prescribing a reasonable period within which an accrued cause of action can be enforced by suit, actually delimits the liability itself." [R. 64.]

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[17]Dodd, *The Power of the Supreme Court to Review State Decisions in the Field of Conflict of Laws* (1926), 39 Harv. L. Rev. 533, 545, 550-552.

[18]On the other hand, where a call or assessment has no statutory base, the full faith and credit clause does not apply. *Great Western Telegraph Co. v. Purdy,* 162 U. S. 329, 16 S. Ct. 810, 40 L. ed. 986 (1896); *id.,* 83 Iowa 430, 50 N. W. 45 (1891); *Great Western Telegraph Co. v. Gray,* 122 Ill. 630, 14 N. E. 214 (1887); Act for Establishment of Telegraphs, Ill. Laws Jan.-Oct. 1849, p. 188.

The full faith and credit clause forbids California from resorting to a lapse of time prior to the existence of the Ohio Superintendent's cause of action in order to apply Section 359 of the California Code of Civil Procedure. In *Rankin v. Barton,* 199 U. S. 228, 230, 231-232, 26 S. Ct. 29, 30, 50 L. ed. 163, 166 (1905), where an analogous situation was presented, this Court said:

> "The question in this case is the application of the statute of limitations of a state to the liability of a stockholder of a national bank before the amount of such liability has been ascertained and assessed by the Comptroller of the Currency. The trial court held the statute applicable, and its judgment was affirmed by the supreme court of the state. . . .
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> "The administration of the bank's assets is . . . vested in the Comptroller of the Currency. . . . The individual liability of a stockholder can only be enforced by his order. The provision is as much for the benefit of the stockholders as for the United States, and it is indispensable to the bringing of a suit against the stockholder. In other words, the liability dates from the order of the Comptroller."

In *Rawlings v. Ray,* 312 U. S. 96, 99, 61 S. Ct. 473, 474, 85 L. ed. 605, 608 (1941), this Court observed "that the contingent obligation of a stockholder to pay an assessment was rendered absolute by the Comptroller's action in ordering one. . . ."

So, also, as stated in *Baumgardner v. State,* 48 Ohio App. 5, 32, 192 N. E. 349, 361 (motion to certify denied by Ohio Sup. Ct., 1934), the Ohio Superintendent's determination is "the condition precedent to the enforcement of the liability under the provisions of Section 710-75 of the General Code."

Where a similar full faith and credit question arose in *Christmas v. Russell*, 5 Wall. 290, 300, 18 L. ed. 475, 478 (1866) this Court said:

> "But the provision under consideration is not a statute of limitations as known to the law or the decisions of the courts upon that subject. Limitation, as used in such statutes, means a bar to the alleged right of the plaintiff to recover in the action created by or arising out of the lapse of a certain time after the cause of action accrued, as appointed by law."

Compare:

Fauntleroy v. Lum, 210 U. S. 230, 28 S. Ct. 641, 52 L. ed. 1039 (1908);

Roche v. McDonald, 275 U. S. 449, 48 S. Ct. 142, 72 L. ed. 365 (1928);

Milwaukee County v. M. E. White Co., 296 U. S. 268, 277, 56 S. Ct. 229, 234, 80 L. ed. 220, 228 (1935);

Milliken v. Meyer, 311 U. S. 457, 61 S. Ct. 339, 85 L. ed. 278 (1940);

Lamb v. Powder River Live Stock Co., 132 Fed. 434, 443 (C. C. A. 8th, 1904).

In other words, California cannot, under the guise or pretext of merely affecting remedy or procedure, avoid giving full faith and credit to the assessment at bar levied pursuant to the "public acts" of Ohio.[19]

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[19] *Broderick v. Rosner*, 294 U. S. 629, 643, 55 S. Ct. 589, 592, 79 L. ed. 1100, 1107 (1935);
Titus v. Wallick, 306 U. S. 282, 292, 59 S. Ct. 557, 562, 83 L. ed. 653, 659, 660 (1939);
Roche v. McDonald, 275 U. S. 449, 48 S. Ct. 142, 72 L. ed. 365 (1928).

F. CALIFORNIA'S DISCRIMINATION AS BETWEEN ASSESSMENTS LEVIED UNDER PARALLEL FACTS IN OHIO AND CALIFORNIA ABRIDGES THE PRIVILEGES AND IMMUNITIES GUARANTEED BY ARTICLE IV, SECTION 2, OF THE FEDERAL CONSTITUTION.

It seems clear, as the dissenting justices in the case at bar point out, that:

> "California has no policy necessitating the destruction of the substantive right of the foreign bank depositor to enforce the liability imposed upon the bank's stockholders, and no interest in riding over such rights. In fact, its policy is to impose such liability, for not only does it have a bank act substantially identical with the Ohio statute, but this [California] court has held that the liability under that act is not created until an assessment is made by the superintendent of banks. (*Richardson v. Craig, supra*;[20] see, also, *Johnson v. Greene,* 88 F. 2d 683, reaching the same conclusion regarding the National Bank Act, from which the California and Ohio statutes were copied.)" [R. 67.]

The majority opinion seeks to distinguish between the obligation of Ohio and California bank stockholders by pointing out that "the Ohio courts have denominated the stockholders' liability direct, primary and self-executing, as distinguished from the indirect and secondary stock-

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[20] *Richardson v. Craig* is reported in 11 Cal. (2d) 131, 77 P. (2d) 1077 (1938).

holders' liability involved in . . . California . . ." [R. 63.] The emptiness of such labels is illustrated by comparing:

> *National Bank v. Kennedy*, 17 Wall. 19, 22, 21 L. ed. 554 (1873);
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> *Baumgardner v. State*, 48 Ohio App. 5, 16-25, 192 N. E. 349, 355-361 (1934); and
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> *Richardson v. Craig*, 11 Cal. (2d) 131, 77 P. (2d) 1077 (1938).

But the California Supreme Court's supposed distinction between the Ohio and California laws respecting bank stockholders' liability rests ultimately upon the assumption that in Ohio "the creditors could have enforced" the obligation sued upon in the case at bar [R. 60]. There are two sufficient reasons why that claimed distinction can be of no consequence here.

In the first place, as we have seen, Ohio has by statute empowered her superintendent of banks to enforce the stockholder's liability. While in the second place, the cause at bar does not concern what the creditors *might* have done, but only the cause of action which the Ohio Superintendent of Banks has in fact asserted and requested California to enforce. In the words of *McDonald v. Thompson*, 184 U. S. 71, 76, 22 S. Ct. 297, 46 L. ed. 437, 440 (1902):

> ". . . it is . . . sufficient to say of this that the action is not brought by the creditors . . . but by the receiver . . . In such cases no debt becomes due to the receiver as such until a deficiency has been ascertained and an assessment made . . ."

In *Richardson v. Craig,* 11 Cal. (2d) 131, 77 P. (2d) 1077 (1938):

(a) A California bank failed,

(b) The California Superintendent of Banks took possession, made his appraisals, estimated the assets available with which to pay the claims of depositors, and

(c) Demanded that the bank stockholders pay the deficiency on or before a certain date—*i. e.,* levied an assessment.

The majority opinion of the California Supreme Court in the case at bar concedes:

> "In the case of *Richardson v. Craig,* 11 Cal. 2d 131 (77 P. 2d 1077), this court held that the liability under the California Bank Stockholders' Liability Act (Deering's Gen. Laws, Act 652a) was 'created' when the assessment was made." [R. 62.]

In other words, the California Supreme Court holds that under this state of facts the period specified in Section 359 of the California Code of Civil Procedure did not commence to run until the date of levy of the California Superintendent's assessment. To state it differently, California refuses to set in motion its so-called statute of limitations against the California Superintendent of Banks at any time before the happening of the event upon which the California Superintendent's cause of action is predicated.

In the case at bar:

(a) An Ohio bank failed,

(b) The Ohio Superintendent of Banks took possession made his appraisals, estimated the assets available with which to pay claims of depositors, and

(c) Demanded that the bank stockholders pay the deficiency on or before a certain date—*i. e.,* levied an assessment.

The obvious result of the decision in the case at bar is that California grants to her Superintendent of Banks the right to sue upon his assessment in the courts of California, but denies the Ohio Superintendent of Banks an equal right under parallel facts and circumstances.

It is therefore true, as the dissenting justices of the California Supreme Court state:

> "The majority opinion, while conceding the right to maintain actions in the courts of this state to the California superintendent of banks, denies such a right on parallel facts to the Ohio superintendent and thus vitiates the Ohio statutory provisions relating to assessments." [R. 67.]

Such unwarranted discrimination manifestly abridges the privileges and immunities guaranteed by Article IV, Section 2, of the Federal Constitution. As this Court stated in *Ward v. Maryland,* 12 Wall. 418, 430, 20 L. ed. 449, 452 (1871):

> "Attempt will not be made to define the words 'privileges and immunities,' . . . Beyond doubt those words are words of very comprehensive mean-

ing, but it will be sufficient to say that the clause plainly and unmistakably secures and protects the right of a citizen of one state to pass into any other state of the Union . . . to maintain actions in the courts of the state . . ."

Later, in *Blake v. McClung,* 172 U. S. 239, 252, 19 S. Ct. 165, 43 L. ed. 432, 437 (1898), this Court said:

"In the *Slaughter-House Cases,* 16 Wall. 36, 77 (21: 394, 409), the court . . . said: . . . 'Its sole purpose was to declare to the several states that whatever those rights, as you grant or establish them to your own citizens, or as you limit or qualify, or impose restrictions on their exercise, the same, neither more nor less, shall be the measure of the rights of citizens of other states within your jurisdiction.'

"In *Cole v. Cunningham,* 133 U. S. 107, 113, 114 (33: 538, 542), this court cited with approval the language of Justice Story, in his Commentaries on the Constitution, to the effect that the object of the constitutional guaranty was to confer on the citizens of the several states 'a general citizenship, and to communicate all the privileges and immunities which the citizens of the same state would be entitled to under like circumstances, and this includes the right to institute actions.' "

In *Chambers v. Baltimore & O. R. R. Co.,* 207 U. S. 142, 149, 28 S. Ct. 34, 35, 52 L. ed. 143, 146 (1907), this Court declared:

"Any law by which privileges to begin actions in the courts are given to its own citizens and withheld from the citizens of other states is void, because in conflict with the supreme law of the land."

Again, in *Maxwell v. Bugbee*, 250 U. S. 525, 537, 40 S. Ct. 2, 63 L. ed. 1124, 1130 (1919), this Court said that Article IV, Section 2, secures in each state to the citizens of all other states "the right to the usual remedies for the collection of debts . . ."

More recently, in *McKnett v. St. Louis & S. F. Ry. Co.*, 292 U. S. 230, 233, 54 S. Ct. 690, 78 L. ed. 1227, 1229 (1934), the Court observed:

> "The privileges and immunities clause requires a state to accord to citizens of other states substantially the same right of access to its courts as it accords to its own citizens. Corfield v. Coryell, 4 Wash. C. C. 371, 381, Fed. Cas. No. 3,230."

In the language of Mr. Justice Roberts in *Hague v. C.I.O.*, 307 U. S. 496, 511, 59 S. Ct. 954, 83 L. ed. 1423, 1434 (1939), "it has come to be the settled view that Article 4, §2, does . . . import . . . that in any state every citizen of any other state is to have the same privileges and immunities which the citizens of that state enjoy. The section, in effect, prevents a state from discriminating against citizens of other states in favor of its own."

Thus, the California Supreme Court in discriminating against the Ohio assessment, "attempted to achieve a result that the Constitution of the United States forbade."[21]

The abridgement of the petitioner's privileges and immunities inevitably followed the California Supreme Court's refusal to give full faith and credit to the peti-

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[21] *Kenney v. Loyal Order of Moose*, 252 U. S. 411, 415, 40 S. Ct. 371, 372, 64 L. ed. 638, 641 (1920).

tioner's assessment based upon the "public acts" of Ohio. As this Court said in *Pink v. A. A. A. Highway Express, Inc.*, 314 U. S. 201, 62 S. Ct. 241, 86 L. ed. (Adv. Ops.) 200, 204 (1941):

> "It was the purpose of that provision to preserve rights acquired or confirmed under the public acts and judicial proceedings of one state by requiring recognition of their validity in others."

Conclusion.

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Honorable Court of its supervisory powers, in order that the rights guaranteed to the petitioner by Sections 1 and 2 of Article IV of the Constitution of the United States be recognized and accorded to the petitioner, and that to such an end a writ of certiorari should be granted and this Honorable Court should review the decision of the Supreme Court of the State of California and finally reverse it.

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